POPULAR INDUSTRIES LTD.

v.

THE EASTERN GARMENT MANUFACTURING CO. SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 291 OF 81]
1 AUGUST 1989

CONTRACT: *Construction of 26 order forms - For delivery of certain goods within a specified period - Whether contracts were concluded - Breach of contract interpretation of contract - Failure to provide credit - Discharge - Previous course of dealings between the parties.*

DAMAGES: *Quantum of damages - Assessment of - General principles - Measure of damages - Burden of proof - Question of the quantity of evidence expected - When assessment is impossible - Only nominal damages.*

EVIDENCE: *Documentary evidence - Exceptions - Burden on party seeking to adduce secondary evidence - Failure to object - Still inadmissible - Entries - Proof of personal knowledge - Sections 34, 64 of the Evidence Act.*

The plaintiffs in Canada, ordered certain goods, by way of 26 order forms, from the defendants in Penang, Malaysia.

The goods were to be delivered between the months of January and June 1980. The plaintiffs averred that the defendants knew that the plaintiffs bought the goods for resale at a profit and that in breach of the contracts, the defendants failed to deliver the goods.

The defendants raised two points, namely:

(i) that there was no concluded contract;

(ii) alternatively, even if there were concluded contracts, the defendants were discharged by reason of the failure of the plaintiffs to provide any letter of credit.

The learned Judge after finding that the defendants were liable for damages for breach of contract, went on to assess the quantum of damages.

Held:

[1] That each and everyone of the 26 contracts sued on was a valid and binding contract.

[2] Having regard to the previous course of dealings between the parties, the plaintiffs were under no obligation to open the letters of credit, until and unless the defendant had furnished the shipping dates.

[3] That the defendants were liable for damages for breach of contract.

[4] That, although the plaintiff had shown the fact of damage, no evidence or sufficient evidence was adduced as to its amount, making it virtually impossible to assess damages. In the circumstances, the plaintiffs were only entitled to nominal damages.

[Order accordingly.]

Cases referred to:

Pavia & Co. SPA v. Thurmann-Nielson [1952] 2 QB 84

Sinason-Teicher Luter American Grain Corporation v. Oilcakes & Oilseeds Trading Co. Ltd. [1954] 1 WLR 1394

Ian Stach Ltd. v. Baker Bosley Ltd. [1958] 2 QB 130
Hillas & Co. Ltd. v. Arcos Ltd. [1932] 147 LT 503
F & G Sykes (Wesex) Ltd. v. Fine Fare Ltd. [1967] 1 Lloyd's Rep 53
Trans Trust SPRL v. Danubian Trading Co. Ltd. [1952] 2 QB 294
Amalgamated Investment v. Texas Commerce [1981] 3 All ER 577
Hindley & Co. v. Tothill, Watson & Co. [1894] 13 NZLR 13
Soproma SPA v. Marine and Animal By-Products Corporation [1966] 1 Lloyd's Rep 367
Koufos v. Czarnikow Ltd. (The Heron II) [1969] 1 AC 350
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528
Pegasse [1981] TLR 175
Haskell v. Bagot [1911] 13 CLR 374
Aryeh v. Lawrence Kostoris & Son [1967] 1 Lloyd's Rep 63
Lesters Leather and Skin Co. v. Home and Overseas Brokers [1948] 64 TLR 569
Selvanayagam v. University of West Indies [1983] 1 WLR 585
Frank Mott & Co. Ltd. v. Muller & Co. (London) Ltd. [1922] 13 LlLR 492
Grebert-Borgenis v. J & W Nugent [1885] 15 QBD 85
Patrick v. British Grain Export Co. Ltd. [1927] 2 KB 535
Household Machines Ltd. v. Cosmos Experts Ltd. [1947] KB 217
J. Leavy & Co. Ltd. v. George H. Hirst & Co. Ltd. [1944] KB 24
Marzetti v. Williams [1830] 1 B & Ad 415
Dixon v. Deveridge [1825] 2 C & P 109
Twyman v Knowles [1853] 13 CB 222
Biggin v. Permanite [1951] 1 KB 422
Aerial Advertising Co. v. Batchelors Peas [1938] 2 All ER 788
Ashcroft v. Curtin [1971] WLR 1731
Johnson v. Kershaw [1847] 1 Deg & Sm 260, 63 ER 1059
Potts v. Miller [1940] 64 CLR 282
Guan Soon Tin Mining Co. v. Ampang Estate Ltd. [1973] 1 MLJ 25
Sanjay Cotton Co. v. Omprakash [1973] AIR Bom 40
Malaysia National Insurance Sdn. Bhd. v. Malaysian Rubber Development Corporation [1986] CLJ (Rep) 185
Beni v. Bisan Dayal & Anor. [1925] AIR Nag 445
Bonham-Carter v. Hyde Park Hotel [1948] WN 89
Lee Sau Kong v. Leow Cheng Chiang [1961] MLJ 17

Legislation referred to:
Evidence Act, ss. 34, 64, 65(1), 104

For the plaintiff - D. Goon (Jennifer Cheong with him); M/s. Mah-Kok & Din
For the defendants - R.R. Chelliah (Mahendran with him); M/s. R.R. Chelliah Brothers

JUDGMENT

Edgar Joseph Jr J:

This was a plaintiff purchases' claim for damages for non-delivery of goods alleging loss of profits on resale.

At all material times to this suit, the plaintiffs were and are an incorporated company having their registered office and place of business at 6255 rue Hutchinson Street, Montreal, Quebec, Canada, while the defendants were and are an incorporated company having their registered office at Lot 1242, Sungei Kluang Estate, Bayan Free Trade Zone, Penang.

The plaintiffs were and are also traders importing garments from suppliers in various countries including Malaysia, Singapore, Hong Kong, China and Taiwan, for resale to retail outlets being, they claim, approximately 500 departmental chain and speciality stores in Canada. The defendants were the Malaysian suppliers of the plaintiffs since 1963 until sometime in 1979, when disputes between the parties arose ending in the present litigation.

It was alleged in the statement of claim that by 26 contracts in writing - all in a printed common form and prepared by the plaintiffs - made between the months of March and June 1979, the plaintiffs ordered and the defendants agreed to deliver certain goods, namely ladies' and girls' blouses and men's shirts, such goods to be delivered between the months of January and June 1980. It was further alleged in the statement of claim that at all material times the defendants well knew that the plaintiffs bought the said goods in the ordinary course of their business for resale at a profit to its customers, and that in breach of the said contracts, the defendants wrongfully failed to deliver the said goods as agreed or at all. It was also alleged that the plaintiffs were unable to purchase similar goods on the market and therefore unable to supply their customers and so lost the profits they would have made on the resale thereof.

The damages claimed in the statement of claim were particularised as the loss of profits which were alleged to amount to 32% on the landed value of the goods being US$2,708,214.82 or in other words, US$708,708.74.

The breakdown of the sum claimed was as follows:

Particulars

7.1 Cost price of MA Form Blouses	US$394,533.88
25% Duty	$ 98,633.47
15% Freight & Insurance	$ 59,180.09
Value Landed	$552,347.44
7.2 Cost Price of MB Form Blouses	US$424,990.08
18% Duty	$ 76,498.21
15% Freight & Insurance	$ 63,748.51
	$565,236.80
7.3 Cost Price of MA Form Shirts	US$325,034.28
25% Duty	$ 81,258.57
17% Freight & Insurance	$ 52,255.83
Value Landed	US$458,548.68
7.4 Cost Price of MB Form Shirts	US$473,023.62
18% Duty	$ 85,144.26
17% Freight and Insurance	$ 80,414.02
	US$638,581.90
7.5 Total Landed Value	= US$2,214,714.82
Average profit on selling 32%	= US$708,708.74

By their defence, the defendants took two points, namely that (1) there was no concluded contract as alleged or at all. In particular, it was alleged that each of the alleged contracts were merely order forms, the acceptance thereof being subject to a condition precedent that the plaintiffs had to open irrevocable letters of credit in favour of the defendants, at least 60 days before shipment and the plaintiffs having failed to do so in respect of all of the contracts, there never was any concluded contracts. In the alternative, (2) it was contended that even if there were concluded contracts, the defendants were discharged from performing their part of the contracts by reason of the failure of the plaintiffs to provide any letter of credit.

Before I construe the words of the contracts, I would make some general observations. In ordinary contracts for the sale of goods, delivery and payment are concurrent obligations, but in contracts in which the price is to be paid by means of a commercial credit "the seller is entitled, before he ships the goods, to be assured that on shipment, he will get paid". (Per Denning LJ in *Pavia & Co. SPA v. Thurmann-Nielson* [1952] 2 QB 84, 88). Accordingly, in the absence of agreement to the contrary, the credit must be opened by the purchaser at a reasonable time before the shipping period, (*Sinason-Teicher Luter American Grain Corporation v. Oilcakes & Oilseeds Trading Co. Ltd.* [1954] 1 WLR 1394 and this is so even where the vendor has some months in which to ship but does not in fact ship until the end of the period. This principle applies even where the contract is on f.o.b. terms in which the buyer is entitled to fix the date of shipment. (See *Ian Stach Ltd. v. Baker Bosley Ltd.* [1958] 2 QB 130. However, since presentation of the shipping documents is a condition precedent to the vendor's right to the credit facilities, he cannot draw against the credit until the goods are shipped. It will be seen, therefore, that payment by means of a banker's credit is intended to operate, and does in fact operate, not merely as a method of payment, but as a means of guaranteeing payment. Thus, the vendor has the right to know before he ships the goods that the credit has been opened, and upon presentation of the documents, he will be paid.

I now turn to consider the particular circumstances of this case.

All the 26 printed contracts were in common form and each provided: "Terms: Letters of credit, 60 days sight - interest at seller's account."

Clearly, as a matter of construction, the above words can only mean that payment is to be effected by means of letters of credit. In other words, they define the mode of payment.

Now there are, as is well known, four kinds of letters of credit; namely, the credit may be payable by sight payment, by deferred payment, by acceptance or by negotiation.

In the present case, the parties had chosen, in unmistakable terms, that the manner in which the sellers were to obtain the moneys due to them under the credit, was by sight payment. Most particularly, the expression "Letters of credit, 60 days sight" connotes a determinable future time meaning that the advising bank is to pay or arrange for payment to the sellers the monies due within 60 days upon sight or presentation of the relevant shipping documents, an event which could only occur after shipment of the goods by the sellers, especially so since this was an f.o.b. contract whereby it would be the sellers' duty to place the goods free on board a ship. But, I would hasten to interpolate, that in the instant case, the evidence disclosed, that the contracts were not classic f.o.b. contracts, but variants thereof because it was the defendant sellers who selected the ship, made all the arrangements for shipping and delivered the shipping schedules.

As to the time for delivery, each of the contracts sued on embodied a "box" headed "Shipping Dates and Quantities", but no date of shipment was stipulated though the month and year were.

Counsel for the defendants contended that where a whole month is given for delivery, delivery could be effected anytime during that month and the relevant date for purposes of opening letters of credit was the first day of the month. So, for example, argued Counsel, in the case of the contract (p. 8 AB) which provided for delivery in January 1980, since the contract provided for payment by "Letters of credit, 60 days sight" letters of credit had to be opened by the plaintiffs not later than 31 October 1979. Failure to comply with this requirement meant that a condition precedent for the formation of the contract would not have been fulfilled

and since it was common ground that letters of credit had not in fact been opened by the plaintiffs, on this ground alone, the suit had to be dismissed - so ran Counsel for the defendants' argument.

It is a familiar proposition that Courts strive to uphold rather than destroy bargains which the parties believe to have concluded and this is especially so in the case of commercial dealings in a trade with which both parties are familiar. As was aptly put by Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.* [1932] 147 LT 503, 514:

> Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English Law, *verba ita sunt intelligenda ut res magis valear quam pereat*.

In accordance with this approach, the Court may import terms from a previous course of dealings between the parties. In *Hillas*, the House of Lords decided that an option was enforceable although expressed in vague terms because the uncertainty could be resolved by reference to the principle contract of which the option was a part, the parties' previous dealings, and the practice in their trade.

There is also authority for saying that in commercial agreements, the further the parties have gone on with their contract the more ready the Courts will be to give effect to their intentions by resolving uncertainties rather than holding that there was no binding agreement. (See *F & G Sykes (Wesex) Ltd. v. Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53).

Now although the contracts in the present case provide for the opening of letters of credit, there was no provision therein stipulating that the contracts shall be "subject to opening of a credit". Had there been such a stipulation the opening of the credit would be a condition precedent for the formation of the contracts and, to quote Denning LJ in *Trans Trust SPRL v. Danubian Trading Co. Ltd.* [1952] 2 QB 294, 304 "if no credit is provided, there is no contract between the parties."

However, in the normal case, when the contract is unqualified, the stipulation to open a letter of credit is only a condition precedent to the **performance** of the contract; it is the machinery agreed upon for the payment of the price.

In the present case, nowhere in the contracts was there any provision that the existence of the contract depended on the opening of the credit by the plaintiffs. The parties had not agreed either expressly or impliedly to that effect and their previous course of dealings confirm that.

Having regard to my conclusion regarding the interpretation to be placed upon the terms as to payment, the primary defence advanced on behalf of the defendants that there was no concluded contract because in the case of each of the 26 contracts sued on letters of credit had not been opened 60 days before shipment, is clearly unsustainable.

The only condition precedent for the formation of a valid and binding agreement in the case of each of the 26 contracts was the stipulation in clause 1 therein that "advance sample must be as per our specification and approved by the purchaser before this contract is valid."

It was alleged by the witness Mrs. Segal (PW1), the personal secretary and wife of the chairman of the plaintiff Mr. Michael Segal (PW2), and not challenged by the defendants, that she had "participated in the negotiations and handling of all details concerning the contracts" and that this condition had been duly complied with.

In the circumstances, I am satisfied that each and everyone of the 26 contracts sued on was a valid and binding contract.

I now turn to consider the alternative defence advanced on behalf of the defendants, namely, that they were discharged from performing their part of the contracts by reason of the failure of the plaintiffs to provide any letters of credit up to the trial.

In my view, in considering the alternative defence, it is important to have regard to the previous course of dealings between the parties.

In other words, the 26 contracts sued on fall to be construed in the general context of the parties' transactions rather than as separate documents in isolation. I am supported in this by certain passages in the judgment of Lord Denning in *Amalgamated Investment v. Texas Commerce* [1981] 3 All ER 577 at p. 583 wherein he deals succinctly with the matter of how a course of dealing can give rise to legal obligations; this is how he put it:

> Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete: see *Brogden v. Metropolitan Railway* [1877] 2 App Cas 666 at 682 per Lord Hatherley. It may be used so as to introduce terms and conditions into a contract which would not otherwise be there: see *J. Spurling Ltd. v. Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, and *Henry Kendall & Sons (a firm) v. William Lillico & Sons* [1966] 1 All ER 309 at 322, 327-329, [1966] 1 WLR 287 at 308, 316, CA; [1968] 2 All ER 444 at 462, 474-475, 481, [1969] 2 AC 31 at WLR 287 at 308, 316, CA; [1968] 2 at 90, 104, 113 (per Lord Morris, Lord Guest and Lord Pearce in the House of Lords all disapproving the *dictum* of Lord Devlin in *McCutcheon v. David Macbrayne Ltd.* [1964] 1 All ER 430 at 437, [1964] 1 WLR 125 at 134) and *Hollier v. Rambler Motors Ltd.* [1972] 1 All ER 399 at 403-404; [1972] 2 QB 71 at 77-78 per Salmon LJ. If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. If parties to a contract, by their course of dealings, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealings, put their own interpretation on their contract, and cannot be allowed to go back on it.
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> To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v. Great Boulder Pty Gold Mines Ltd.* [1937] 59 CLR 641 the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the parties. That is the principle on which we acted in *Crabb v. Arun District Council* [1975] 3 All ER 865, [1976] Ch 179. It is particularly appropriate here where the Judges differ as to what is the correct interpretation of the terms of the guarantee. The trial Judge interpreted it one way. We interpret it in another way. It is only fair and just that the difference should be solved by the course of dealing, by the interpretation which the parties themselves put on it and on which they have conducted their affairs for years.

Now, between 1963 and mid 1979, when the disputes between the parties arose, the format of the contracts used by the parties, was the same as that sued on. Mrs. Segal's evidence was - and I believe her - that throughout the plaintiffs' dealings with the defendants, letters of credit had usually been opened 15 to 90 days before shipment and that in the majority of

cases, letters of credit were opened between 45 to 60 days prior to a given shipment date. Mrs. Segal further testified - and again I believe her - that it was the practice that the defendants would inform the plaintiffs of the name of the ship and the date of the shipment after which the plaintiffs would open the letters of credit. This testimony was confirmed by the contemporary telexes which show the plaintiffs asking for delivery schedules. (See Ex. P1, P31 and P32).

Dealings between the plaintiffs and the defendants proceeded smoothly in this way for some 16 years. However, sometime in mid July 1979, trouble erupted when one Jesse Zee (DW1) succeeded one Ted Tang as managing director of the defendant company. This event, according to Counsel for the plaintiffs - and I so find - was the source of the problem which gave rise to the disputes the subject of this litigation.

Indeed, Counsel for the defendants had himself conceded that prior to July 1979, the managing directors of both the plaintiffs and the defendants were very friendly and carried on business in a very informal manner and by way of illustration added that payments for the purchase of garments were made by letters of credit but these were opened very irregularly, sometimes only a few days before actual shipment. However, Counsel went on to point out, that when in July 1979 Jesse Zee succeeded Ted Tang as managing director, the new management decided to run the defendant company in a more business like manner; meaning, I suppose, that they insisted on their strict contractual rights.

The main thrust of the defence case was the testimony of Zee claiming that sometime in September 1979 he had spoken over the telephone to one Gerald Cohen, the president of the defendant company, insisting that the plaintiffs open letters of credit 60 days before shipment and that this had been agreed by the latter resulting in a "new arrangement" between the plaintiffs and the defendants.

However, the contemporary telexes do not support this claim, no mention having been made therein as to the so-called "new arrangement".

Nor, for that matter, was any consideration alleged for this "new arrangement" although it is clear law that a variation of a contract is invalid unless it is supported by consideration. (See *Hindley & Co. v. Tothill, Watson & Co.* [1894] 13 NZLR 13 23 and *Soproma SPA v. Marine and Animal By-Products Corporation* [1966] 1 Lloyd's Rep. 367, 386.

I do not propose to solemnly wade through the contemporary telexes but I think that it would not be an unfair summary of their contents if I said they showed that:

(1) Zee made valiant efforts to exact from the plaintiffs the opening of letters of credit as early as possible even up to 102 days before shipment, contrary to the previous course of dealings as deposed to by Mrs. Segal, of which Zee had, of course, no personal knowledge;

(2) Zee also strove to obtain a substantial price increase of US$1 per garment;

(3) The defendants, through Mr. Segal, did attempt a compromise by offering to open letters of credit 60 days before shipment and a limited price increase of US50 cents per garment but Zee did not respond to these attempts. This was sometime in February 1980 when the first shipment that year was to have been in January 1980;

(4) Zee then sought "red clause LCs" unsupported by reasons;

(5) The plaintiffs, through Mr. Segal, had been making persistent requests for shipment schedules in accordance with the previous course of dealings but these were ignored by Zee. (I would interpolate to remark that Zee made no reply stating that there never was any arrangement for shipment schedules to be given.); and

(6) The defendants were unable to make delivery of the goods contracted for within the delivery periods stipulated under the 26 contracts and that they were incurring financial losses at the material time. Indeed, the plaintiffs had warned the defendants that they had missed sales due to late delivery and would hold them responsible for losses incurred.

In evaluating the testimony of Zee, I would say, without mincing words, that I regard with very considerable scepticism his testimony about the so-called "new arrangement" he claimed to have arrived at with Cohen on the telephone unsupported as it was by the contemporary telexes. I consider that having regard to its importance, a hard headed businessman of Zee's standing would, in all probability, have made specific reference to it in writing had there in fact been such an arrangement.

In this connection, I have not overlooked the telex from Cohen to Zee dated 24 January 1980 wherein a general reference was made to a telephone call from Zee to Cohen, with the remarks, "we are studying the matter very carefully" followed by a demand, "must have definite information regarding deliveries".

At no time while he was in the witness box did Zee attempt to deal with the telephone conversation referred to in this telex but, on the other hand, nor was Cohen called to testify, though it was explained, without challenge, that the latter was sick and therefore unable to make the journey all the way from Canada to testify.

In the circumstances, having regard to the evidence relevant to the question whether there was this "new arrangement", not forgetting the impression made upon me by Zee as he testified in the witness box, I have no hesitation in finding that Zee's evidence on the point is a pure invention. In my opinion, there was no such "new arrangement".

Continuing my assessment of Zee's evidence, it was submitted by Counsel for the defendants, and I agree, that Zee quite clearly did not appreciate the distinction between the shipment period in the contract, and the shipment date as used by the parties in the performance of the contracts. I have already said, and I would repeat that, I accept the testimony of Mrs. Segal that it had been the practice during the time Ted Tang was the managing director of the defendants that the defendants would inform the plaintiffs of the name of the ship and the date of the shipment after which the plaintiffs would open the letters of credit usually 15 to 90 days before shipment, and that in the majority of cases, letters of credit were opened 45 to 60 days prior to a given shipment date. This was the course of dealings pursued by the parties for many years prior to the disputes the subject of this action. That being the case, in the words of Lord Denning in the *Amalgamated Investment* (*ibid*) case at p. 584 C:

> ... it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to the dealing which have taken place between the parties ...

Following the course of dealings aforesaid, in order for the plaintiffs to have opened the letters of credit they had to be informed of the shipment dates. Zee insisted that the defendants were unable to get shipment dates 60 days before shipment but this was contradicted by the contemporary documents, in particular Exh. P1 (sent during Zee's time as managing director) which showed that shipment dates had been given by the defendants well before 60 days prior to shipment.

In all the circumstances, I am satisfied, having regard to the course of dealings aforesaid, that the defendants had been in breach of their contractual obligations to furnish the shipping dates to the plaintiffs. Until and unless the defendants discharged that obligation the plaintiffs were under no obligation to open the letters of credit. I therefore find that the defendants are liable for damages for breach of contract.

I now turn to assess the quantum of damages for breach of contract.

By their statement of claim the plaintiffs claimed that by reason of the defendants' breaches of the contracts concerned in failing to deliver the garments between the months of January to June 1980 or at all, the plaintiffs were unable to purchase similar goods on the market and so were unable to supply their customers and lost the profits they would have made on the resale of the garments.

Having given particulars of the loss and damage allegedly suffered, the plaintiffs went on to claim a sum of US$708,708.74 which they said represented the average loss of profits on resale being 32% of the landed value of the garments which the defendants ought to have but did not deliver.

A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same. (See *Koufos v. Czarnikow Ltd. (The Heron II)* [1969] 1 AC 350. In the last mentioned case, the House of Lords disapproved of the foreseeability test propounded by Lord Asquith in the case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528.

In the *Victoria Laundry* case, the plaintiff who were buyers of a boiler for their laundry and dry cleaning business which was delivered late and in breach of contract by the defendants, were held able to recover "ordinary" loss of profits, but not loss of profits from an extraordinarily lucrative contract of which the defendant knew nothing.

In the *Pegasse* [1981] TLR 175, 182, Goff J (as he then was) referred to the principles aforesaid and commenting on the judgments of their Lordships in the *Heron II* (*ibid*), said this at p. 182:

> .. .the thread running through the speeches is that the damages must have been within the contemplation of the defendant, not in the sense that they were probable (which would be too strict a test) but rather in the sense that there was a serious possibility of their occurrence or that they were not unlikely to occur ...

Now, the normal measure of damages for non-delivery of goods sold is the difference between the market price and the contract price but this rule applies only where there is an "available market", that is to say, that the buyer should be able to go out and buy equivalent goods.

In the case of fob or cif contracts, the relevant market for the purpose of the assessment of damages, in the case of non-delivery, is the market price at the place of delivery. (See *Haskell v. Bagot* [1911] and *Aryeh v. Lawrence Kostoris & Son* [1967] 1 Lloyds Rep 63.

But the question arises in what circumstances will the Court hold that the buyer is able to go out and buy equivalent goods. Where the goods concerned are not immediately available or are not near at hand, the question whether the buyer should wait or buy from afar is to be determined by what is reasonable. (See *Lesters Leather and Skin Co. v. Home and Overseas Brokers* [1948] 64 TLR 569 (CA) - "the buyers were not bound to go hunting the globe to find out where they can get snake skins.")

In the present case, the port of destination of the goods was Montreal, Canada. Both Mr. and Mrs. Segal had testified without challenge or contradiction, that they could not obtain the goods in Canada as there was no market there for the same nor could they have obtained the goods anywhere else as their quota had been exhausted.

Those being the facts, there was no available alternative source, whereby the plaintiffs could have obtained replacement goods to mitigate their loss. The plaintiffs had therefore discharged the burden of proof which lay upon them in this regard. (See *See Selvanayagam v. University of West Indies* [1983] 1 WLR 585.

In such circumstances, when as here, the buyer is a trader and the seller knew. (*Frank Mott & Co. Ltd. v. Muller & Co. (London) Ltd.* [1922] 13 Ll.LR 492; *Grebert-Borgenis v. J & W Nugent* [1885] 15 QBD 85 or ought to have known (*Patrick v. British Grain Export Co. Ltd.* [1927] 2 KB 535, 541) that the buyer bought the goods with a view to resale, the buyer is entitled to his loss of profits on the resale, upon non-delivery of the goods by the seller. (*Household Machines Ltd. v. Cosmos Experts Ltd.* [1947] KB 217, 219; *J. Leavy & Co. Ltd. v. George H. Hirst & Co. Ltd.* [1944] KB 24.

I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all?

With regard to this part of the case, I would preface what I have to say by referring to certain well established principles.

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v. Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example, *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.

On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422, 438 namely, "where precise evidence is obtainable, the Court naturally expects to have it, where it is not, the Court must do the best it can." Nevertheless, it remains true to say that generally "difficulty of proof does not dispense with the necessity of proof" (see *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the Court will expect precise evidence to be given. (See para. 345 *McGregor on Damages*, 15th Edn.).

It is with the above principles in mind that I turn to examine the evidence adduced by the plaintiffs to determine if they have proved the fact of damage and its amount.

The main witness called by the plaintiffs on this important issue of the quantum of damages, was Mr. Patrick So, a chartered accountant and partner of the firm of Richter, Usher & Vingberg, internationally known as Clark Kenneth Leventhal, the auditors and accountants of the plaintiffs.

By way of introduction, Mr. So said that his firm had been handling the business affairs of the plaintiffs since 1933 until the present day and that he himself had been involved with the auditing of the plaintiffs' accounts from 1975 until 1982. As such he claimed that he had personal knowledge of the plaintiffs' financial affairs during the latter period.

He explained that he first worked for the firm of accountants aforesaid at audit staff level and, in 1979, succeeded to a junior partnership in the firm.

Speaking generally, he said that during the time he was handling the plaintiffs' accounts, their financial standing was quite liquid and that for the fiscal year ended October 1980 they had a working capital in excess of Canadian $5 million. He added that the plaintiffs' practice had been to mark up 50% on the landed cost price of their goods. To illustrate, he said that this meant that if the landed cost of goods was $100, the mark up being 50%, the selling price would be $150. On this basis, the profit would be $50 before operating costs. He explained that the $150 would be considered as the gross margin earned and expressed as a percentage of sales would be 33 1/3%.

However, he conceded that in real terms, in most cases, not all sales would be realised at those selling values since as the sales season progressed, the plaintiffs would have to sell at lower prices until the goods were totally disposed off.

Turning from the general to the particular, the witness testified that if one took the whole season, on the basis of actual performance of the plaintiffs, in 1978, the gross margin realised by the plaintiffs was 23.45%.

In 1979, the percentage was 23.8%.

In 1980, the percentage was 23.2%.

In 1981, the percentage was 23.2%.

In 1982, the percentage was 24.9%.

He went on to say that over the five year period between 1978 and 1982, the plaintiffs' performance was quite consistent with the percentage between 23 and 24.

He then produced a sheet of calculations - Exh. P76 - which was meant to show the estimated losses suffered by the plaintiffs as a consequence of the defendants' non-delivery of the goods the subject matter of the 26 contracts.

Reading from P76, he confirmed that had the defendants delivered the goods concerned, the duty and brokerage would have amounted to Can $399,695 while freight and insurance would have amounted to Can $302,560. The total landed costs would thus have been Can $2,594,726.

Based on these figures, and the actual gross margin of percentage earned in 1979, he was of the view that Can $3,378,550 would have been the estimated selling value of the goods. Accordingly, Can $783,824 would have been the gross profit the plaintiffs would have made had the defendants delivered the goods concerned.

He then dealt with the overhead expenses the plaintiffs would have incurred which are particularised in P76 and which I need not delve into and concluded the plaintiffs' loss to be Can $502,997 by reason of the defendants not having honoured their contractual obligations.

Asked by Counsel for the plaintiffs if he was sure that the plaintiffs would have made the projected sales concerned, the witness replied that to answer that question one had to look at the consistency of the gross margin realised from year to year.

He then ventured the opinion that had the plaintiffs received the merchandise as contracted for, he was confident that the plaintiffs would have realised the profits shown in P76 but quickly added the qualification that the plaintiffs would have had little difficulty in realising the profits shown therein.

Under cross-examination by Counsel for the defendants, the witness said that he did not have with him the plaintiffs' audited accounts and so could not give full particulars of the plaintiffs' accounts for the period 1975 to 1982.

I must now proceed to evaluate the testimony of this witness.

It is an elementary rule, often overlooked with resulting confusion and possible injustice that cases are decided on evidence; that means, of course, evidence that is admissible in law and relevant to the issues arising for decision.

Now, it was alleged by the plaintiffs that both the oral testimony of the accountant Mr. So (regarding their financial operations) and the statement P76 prepared by him, were based upon the results of his examination of the account books of the plaintiffs for the relevant period. However, the account books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all. In my opinion, the result of this glaring omission, was to render such oral evidence of Mr. So and P76 inadmissible in evidence and it makes not the slightest difference that Mr. and Mrs. Segal confirmed the accuracy of P76. I take the law on this point to be correctly stated by the Vice-Chancellor in *Johnson v. Kershaw* [1847], 1 Deg & Sm 260, 63 ER 1059. In that case the evidence of an accountant was tendered containing the results of his examination of certain partnership books, but the accounts books themselves upon which he based his statement were not in evidence. The Vice-Chancellor said:

> If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr. Peet as to their contents.

That case commended itself to Dixon J (as he then was) in *Potts v. Miller* [1940], 64 CLR 282 at 303.

Nor, does it make any difference that Counsel for the defendants never called for production of the accounts books, since the defendants never agreed to dispense with formal and proper proof of the loss of profits. (See *Guan Soon Tin Mining Co. v. Ampang Estate Ltd.* [1973] 1 MLJ 25, 30 col 2 F to G.

Indeed, a consideration of the relevant provisions of our Evidence Act (Revised-1974) leads irresistibly to the same conclusion as I shall now attempt to demonstrate.

It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say, the production of the documents itself is essential. (See s. 65 Evidence Act).

The exceptions to the rule are also well established and specifically provided for. (See s. 65(1) Evidence Act). Equally clearly the burden of proving the existence of any circumstances bringing the case within any of these exceptions lies upon the party seeking to adduce secondary evidence of the contents of the document. (See s. 104 illustration (b) Evidence Act).

In the present case, the plaintiffs made not the slightest attempt to discharge that burden, with the result that P76 which was alleged to be extracted from the books of accounts of the plaintiffs, which were never produced was inadmissible in evidence. Similarly, the oral evidence of the accountant Mr. So, which was based on P79, was also inadmissible for the same reason.

It is true that Counsel for the defendants did not object to the admissibility of Exh. P79 or the oral evidence thereon of the accountant Mr. So. But, to quote Masodkar J in *Sanjay Cotton Co. v. Omprakash* AIR [1973] Bom 40, 43 "... here what one finds is that the learned Counsel merely said that he has no objection to exhibit the documents ... If that be so, it is neither an admission as to the documents nor can be treated as an admission of the contents thereof."

Moreover, it is settled law that inadmissible evidence does not become admissible, simply by reason of failure to object. If any authority is needed for this proposition I would refer to the following passage in Sarkar, *Law of Evidence*, 13th Edn., p. 51 applied by Lee Hun Hoe CJ (Borneo) in *Malaysia National Insurance Sdn. Bhd. v. Malaysian Rubber Development Corporation* [1986] CLJ (Rep) 185 at 189:

> An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the Court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties ...

Without the evidence of the accountant Mr. So as to the financial operations of the plaintiffs and without P76, there was still the general and slender testimony of Mr. and Mrs. Segal, but this testimony suffers from the same defects as to non-production of the account books hereinbefore mentioned and therefore does not, in my opinion, prove the damages claimed sufficiently or at all.

I would go further and say that even had the accounts books in evidence they could not by themselves have been sufficient to charge the defendants with liability having regard to the provisions of s. 34 of the Evidence Act so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant and auditor Mr. So, despite what he might say, was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts. To emphasise the point I would add that it is common knowledge that when accountants prepare accounts for their clients for submission to the Inland Revenue Department they so certify in the accounts.

Upon this subject, I find the following passage in the judgment of Wadegaonkar J in *Beni v. Bisan Dayal & Anor.* AIR [1925] Nag 445, 446 col 2 para. 2 precisely in point:

> ... Mere entries in books of account are not by themselves sufficient to charge any person with liability (*vide* s. 34 of the Evidence Act). The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate and as no such evidence has been adduced in this case the Court below was wrong in holding that defendant no. 1 had paid the money to plaintiff for payment of the kist for January 1921...

Looking back, in making their claims for damages the plaintiffs were making three assumptions or impliedly relying on three propositions. These were:

(1) that they had a market for the garments the subject of the 26 contracts.

(2) that this market value had been properly proved.

(3) that this market value of the garments not delivered under the 26 contracts was the proper basis for an award of damages.

In my view, the second and third of these propositions or assumptions were mistaken.

The normal course of proving market value in the case of a resale of goods in bulk would be to call the customers or at the least (and if the parties agree to documentary proof) to tender documents showing the existence of and a dealing with such customers. In the case of a (say wholesale) distribution to a number of customers, a plaintiff would at least be required to produce books or documents showing that he had a business in the course of which he might reasonably have distributed these goods and the price he would have obtained. The plaintiffs in this case did none of these things, producing no business books or accounts or documents showing the existence of and a dealing with customers or even income tax returns.

To put it another way, a plaintiff's unsupported assertion or that of his accountant, that he would have got such and such a price for the goods does not prove market value. It must be proved *aliunde* - that is to say, in order to prove that someone would have been prepared to pay the price, you call the man who would have paid. Any plaintiff can say "I could have sold my goods for $X had it not been for what the defendant did." If that is enough to prove market value, it would, in effect, dispense with proof of quantum altogether.

In all circumstances, reason and justice point to the inevitable conclusion that although the plaintiffs had shown the fact of damage, no evidence or no sufficient evidence has been adduced as to its amount with the perhaps unfortunate result that it is virtually impossible to assess damages. (See *Dixon v. Deveridge* (*ibid*) and *Twyman v. Knowles* (*ibid*)).

In this context, I am remained of Lord Goddard's *dictum* in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1961] MLJ 17 (CA), namely that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court, saying 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

Accordingly, all I can do is to make an award of nominal damages of five hundred dollars in US currency that being the currency of the contract. (See *Miliangos v. George Frank* [1953] 1 QB 487 which I hereby do.

Having regard to the fact that the damages I have awarded are a token sum when compared to the damages claimed, in the exercise of my discretion, I make no order as regards interest on damages.

Finally, since most of the time spent at the hearing was devoted to the issue of liability, which I have decided in favour of the plaintiffs, I order that the taxed costs of the action be paid by the defendants to them.

Also found at [1990] 1 CLJ 133